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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954.

No. 365

JOHN POVEY,
Petitioner,

v.

THE MIDVALE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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INDEX.

	Page
Prayer	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case and the Manner in Which Federal Question Was Raised	3
Reasons for Granting of Writ	9
Conclusion	14
Appendix A—Pertinent Statutes	1a
Pennsylvania Arbitration Act, the Act of 1927, April 25, P. L. 381, No. 248, Paragraph 1, 5 P. S. Paragraph 161	1a
Appendix B—Opinions of Courts Below	3a
Opinion Sur Defendant's Petition to Stay Proceedings Pending Arbitration, by the Court of Common Pleas No. 1 of Philadelphia County	3a
Opinion of the Superior Court of Pennsylvania on the Appeal from the Order of the Court of Common Pleas No. 1 of Philadelphia County Discharging Rule to Show Cause Why Proceedings Should Not Be Stayed Pending Arbitration, September Term, 1951, No. 2218	7a
Appendix C—Order of the Supreme Court of Pennsylvania	13a

TABLE OF CASES CITED.

	Page
Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 210 F. 2d 623	11
Case v. National Labor Relations Board, 321 U. S. 332	10
Goldstein, et al. v. International Ladies' Garment Workers' Union, et al., 328 Pa. 385	12
Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210	13
Prudential Insurance Co. v. Cheek, 1922, 42 S. Ct. 516, 259 U. S. 530, 66 L. Ed. 1044	11

STATUTES.

	Page
28 U. S. C. Par. 1257(3)	2

MISCELLANEOUS.

	Page
Constitution of the United States—Article XIV	3, 11, 13

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To the Honorable the Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on the 28th day of June, 1954.

OPINIONS BELOW.

An Opinion was entered by the Court of Common Pleas of Philadelphia County on January 26, 1954, and is unreported. An Opinion was entered by the Superior Court of Pennsylvania on May 27, 1954, and is reported in 175 Pennsylvania Superior Court, page 395. A petition for allowance of appeal from the Superior Court to the Supreme Court of Pennsylvania was denied per Curiam on June 28, 1954, and is unreported.

JURISDICTION.

The Order of the Court of Common Pleas of Philadelphia County was reversed by the Superior Court of Pennsylvania on May 27, 1954. A petition for allowance of appeal from the Superior Court to the Supreme Court of Pennsylvania was filed by the petitioner on the 4th day of June, 1954. An Order was made by the Supreme Court of Pennsylvania denying the petition on June 28, 1954.

The jurisdiction of this Court rests upon 28 U. S. C. Par. 1257(3).

QUESTIONS PRESENTED.

1. Can the petitioner, under the Constitution of the United States, be denied his right to maintain an action in a court of law for personal services rendered by him to his employer, the respondent herein, on an oral contract of hiring, merely because he is a member of a labor union having a collective bargaining agreement with the respondent, which agreement contains an arbitration clause, particularly where the Union denies that any arbitrable issue exists and refuses to be a party to any arbitration?

2. Is a right to maintain an action for personal services based on the oral contract of hiring, or is it based on the collective bargaining agreement where one exists between the respondent and the Union of which the petitioner is a member?

3. Where the statute law of Pennsylvania excludes contracts for personal services from compulsory arbitration, can the petitioner be compelled to submit to arbitration under the common law?

4. Does a State Court have jurisdiction or power to compel an employee to seek redress for wages due him by an arbitration procedure with its limitations, over which he has no control, as set forth in a collective bargaining agreement between a labor union of which he is a member and the employer?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provision involved is found in the Constitution of the United States, Article XIV, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent statutory provisions which are printed in Appendix A, *infra*, pp. 1a-2a, are as follows: Pennsylvania Arbitration Act of April 27, 1927, P. L. 381, 5 P. S. 161.

STATEMENT OF THE CASE AND THE MANNER IN WHICH FEDERAL QUESTION WAS RAISED.

The petitioner has been in the employ of the respondent, a manufacturer of steel products, for many years. He was classified as a Moulder-Coremaker and was paid at the rates applicable to that classification. He discovered that throughout the period of his employment he was doing the work of a Leading Moulder-Coremaker, which entailed additional responsibilities, and called for higher pay.

The rates of pay for various classifications were fixed as a result of collective bargaining agreements entered into between the respondent with the Federal Labor Union No. 18887, affiliated with the American Federation of Labor, of which Union the petitioner was a member.

When the petitioner discovered that he had not received the rates of pay to which he was entitled, he demanded that the defendant pay him the difference between

the total wages actually received by him and the total wages at the higher rate. When the respondent refused to pay, the petitioner instituted an action in assumpsit to recover the additional sums which he claimed were due him for the period not barred by the Statute of Limitations.

In the action of assumpsit, the petitioner stated that the action of the respondent constituted a breach of the petitioner's agreement of employment, which was one of oral hiring, and that his right to recover for this breach was not subject to any grievance procedure of any collective bargaining agreement between the Federal Labor Union and the respondent, and that his action was within the jurisdiction of the courts.

The petitioner, in his Complaint in Assumpsit, admitted that the wage rates for the various jobs, including the jobs and classifications of employment of the petitioner, were negotiated between the Federal Labor Union and the respondent, and became the rates which the petitioner was entitled to receive and which the respondent agreed to pay under his oral agreement of employment.

The petitioner further claimed that the respondent had admitted that he had performed the services of a Leading Moulder, but that he had not received the pay of that classification, and his suit was for the amount that he was underpaid.

Instead of answering the Complaint, the respondent eventually filed a petition for a rule to show cause why proceedings should not be stayed pending arbitration. The petition was predicated upon the fact that the respondent had a collective bargaining agreement with Federal Labor Union No. 18887, and that the various collective bargaining agreements contained provisions for arbitration, and, furthermore, that the petitioner's right, if any existed, to maintain any claim by his action for unpaid wages depended upon the collective bargaining agreements, and therefore the action should be stayed until arbitration had

been had in accordance with the terms of the collective bargaining agreements.

The petitioner, in his Answer, denied that he had a grievance which was subject to the provisions of the arbitration clauses contained in the collective bargaining agreements, and that the basis of his claim was not the result of a grievance under the collective bargaining agreements, but constituted a breach of contract on the part of the respondent to pay wages properly due him under his employment agreement. He claimed that his action was based upon a breach of his employment contract, that he was prepared to prove at the trial that no grievance existed, and that the respondent was attempting to compel the petitioner into a forum not of his own chosing, namely, arbitration, and deprive him of his right of a trial in a judicial tribunal.

The petitioner further contended that his action was the result of a personal right which existed in him to collect moneys due him as a result of the respondent's failure to pay him his wages. He claimed further that the collective bargaining agreement merely fixed the rates of pay to which he was entitled, and that the failure to pay the rates of pay as fixed by the respondent and the labor union did not constitute a grievance under any collective bargaining agreement, but constituted a breach of his oral agreement of employment.

The Court of Common Pleas of Philadelphia on January 26, 1954, discharged the respondent's rule on the petitioner to show cause why proceedings should not stay pending arbitration. As reference to that Opinion (Appendix B) will show, the request for a stay was dismissed because there was no contract between the petitioner and the respondent where the parties agreed to arbitrate conflicts of this type; that the procedure for arbitration was available to the Union of which the petitioner was a member and to the respondent, but not to the petitioner. That Court emphasized that the collective bargaining agreement is not the contract of employment upon which the employee can

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sue or be sued; that the collective bargaining agreement has nothing to do with the individual hiring contracts.[1]

The respondent attempted to show that the Pennsylvania Arbitration Act of 1927 (Appendix A) was applicable, and that if it was not applicable the respondent had the right to compel the petitioner to go to arbitration under the common law. This contention was dismissed by the Court of Common Pleas.

From this Order the respondent appealed to the Superior Court of Pennsylvania. The amount involved required an appeal to that Court first.

The Superior Court of Pennsylvania in its Opinion (Appendix B) reversed the Court of Common Pleas and stayed the proceedings, pending common law arbitration. The Superior Court admitted that statutory arbitration did not apply, because it specifically excluded from its operation all contracts for personal services. It argued, however, that the petitioner was a member of the Federal Labor

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1. As noted by Judge Griffiths of the Court of Common Pleas of Philadelphia County:

> "The language of the Article on Grievances is:
>
> " 'The procedures under this Article are available to the *Union* or the *Company* for the presentation and settlement of grievances arising under the terms of this agreement.'
>
> " 'Should any difference arise between the *Company* and the *Union* as to the meaning and application of or compliance with the provisions of this agreement, . . . there will be no work stoppage but an earnest effort shall be made to settle the matter promptly in accordance with the procedure set forth below.'
>
> "The language of the Arbitration Article also limits the parties covered to the Union and the employer.
>
> " '(In the event the grievance is not settled) such grievance may be appealed to arbitration by *either party*.'
>
> " 'Either party' are those mentioned in the preceding grievance article, the Union or the Company. The term 'Union' is distinct from the term 'employees' and are not used interchangeably."

Union, and therefore was bound by the collective bargaining agreement, and stated:

> "As an incident of membership in a union an employe designates his union as his representative to act for him as his agent in collective bargaining with the employer and *in all matters pertaining to his employment.*" (Appendix B.)

The Superior Court of Pennsylvania, by its action, compelled the petitioner to seek arbitration, even though the Union of which he was a member claimed that there was no grievance under arbitration, and the petitioner himself did likewise.

The Superior Court of Pennsylvania further stated that the action instituted by the petitioner in suing for his wages amounted to a nullification of the collective bargaining agreement and would amount to a denial of the Constitutional rights of the collective bargaining agreement, particularly as it concerned arbitration of grievances.

The petitioner then petitioned the Supreme Court of Pennsylvania for allowance of appeal from the Superior Court to the Supreme Court of Pennsylvania, but that petition was denied.

The federal question sought to be reviewed here was presented and disposed of below as follows:

(1) The federal question was raised for the first time in the Court of Common Pleas in the petitioner's Answer to the Petition for Rule to Show Cause Why Proceedings Should Not Be Stayed Pending Arbitration, in which it was specifically stated that the respondent was attempting to compel the petitioner into a forum not of his own choosing, and deprive him of his right to seek a trial by jury in court, and that the petitioner's action was based upon his personal rights, and not under the rights under the collective bargaining agreement.

The Court of Common Pleas, in dismissing the Rule to Show Cause of the respondent, did not pass upon the Constitutional questions dismissing the respondent's Rule for other reasons, as stated in the Opinion, but the Court by this action sustained the petitioner's right to a trial by a judicial tribunal.

The question was next presented in a Brief presented by the petitioner in the Superior Court of Pennsylvania, in which it was argued that the respondent's Rule to Show Cause Pending Arbitration would deprive the petitioner of his Constitutional rights. Argument was made that if a party to a controversy denies the existence of a contract to arbitrate insofar as that party is affected, that the jurisdiction of the regular courts of justice must be open to him to determine that issue. The petitioner argued that where the existence of a contract between himself and the respondent, providing for arbitration is denied, that he then has a Constitutional right to have the issue determined by a judicial tribunal. The Superior Court did not pass upon this phase of the petitioner's argument.

The question was again presented in the Petition for Allowance of Appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania, in which the attention of the Supreme Court was directed to the fact that the Superior Court of Pennsylvania failed to consider the effects of its decision on the petitioner's Constitutional right, and that, in addition, the petitioner was being deprived of his rights of due process, as well as valuable property rights.

The federal question was not passed upon by the Supreme Court of Pennsylvania in its Order.

REASONS FOR GRANTING OF WRIT.

Important questions are presented in this case, particularly as to the right of an individual to recover for personal services performed by him on an oral contract of hiring.

This question is presented in the light of an employee's membership in a labor union which negotiates collective bargaining agreements fixing rates of pay for various classifications. The precise question would be whether or not an employee, by designating a labor union as his collective bargaining agent with the employer by whom he is employed, designates that labor union as his representative to act for him, as the Superior Court said, "in all matters pertaining to his employment". If this is so, then an employee could at no time sue for wages where the labor union of which he is a member refuses to proceed with such action or where the employee has ceased his membership in the labor union and it no longer is his collective bargaining representative.

In addition, it should be noted that in cases where an employee maintains his employment, but is not a member of a labor union, either because of an open shop arrangement or for other reasons, would such an employee be deprived of his right to bring an action to recover wages due him for personal services?

If the collective bargaining agreement is the focal point in all matters pertaining to employment, then an employee under such conditions sacrifices valuable and important personal rights.

In taking the position that as a result of membership in a union, the employee designates his union as his representative in all matters pertaining to his employment, the appellate courts of Pennsylvania have failed to consider the precise status of a collective bargaining agreement entered into between a labor union and an employer. This phase of labor relations has been considered by the Su-

preme Court of the United States in *Case v. National Labor Relations Board*, 321 U. S. 332, where this Court said, at page 335:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective bargaining agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. . . . The individual hiring contract is subsidiary to the terms of the trade agreement."

An employer has a duty to pay wages only because the individual employee performed his work, and not because the Union promised to refrain from certain acts. The Union does not become the employee's exclusive agent to litigate his individual rights. If this were so, at the will of the Union an individual employee would be completely out of court. He may even be deprived of his salary if a Union, as in this case, refuses to arbitrate. His individual right to compensation for his individual services would be destroyed. There would be no way of enforcing his right to claim his salary.

A debtor cannot discharge himself of a clear legal liability to pay what he owes by insisting that the claim be determined by arbitration, if no contract of arbitration exists between the parties. The right of the petitioner to sue for wages due him is a right which he attains as a third party beneficiary.

Case v. National Labor Relations Board, supra.

It is to be noted that at no time was the Federal Labor Union, of which the petitioner was a member, made a party

to these proceedings. The suit was started by the petitioner against the respondent. The respondent never brought the Labor Union in as a party to the action, nor did it do so in its Rule to Show Cause Why the Proceedings Should Not Be Stayed Pending Arbitration.

The petitioner finds himself in the unenviable position of being required to seek arbitration when the Union is not a party to the proceedings and there is no order against that Union.

The attention of this Court is directed to the case of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 210 F. 2d 623, which held that a collective bargaining agreement does not give the labor union the right to sue for wages, since the right of employees to receive wages and salaries does not arise from individual contracts of employment, and the Third Circuit adopted the theory that the true status of a collective bargaining agreement is that of a codification of the terms and conditions of employment. In this case the Supreme Court of the United States has granted certiorari on June 7, 1954 (Docket No. 51).

The Supreme Court of the United States has said, in *Prudential Insurance Co. v. Cheek*, 1922, 42 S. Ct. 516, 259 U. S. 530, 66 L. Ed. 1044:

> "Freedom in the making of contracts of personal employment by which labor and other services are exchanged for money or other forms of property is an elementary part of the rights of personal liberty and private property not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by this amendment."

If the right to contract for personal services is both a liberty and a property right within the protection of the Fourteenth Amendment of the Constitution of the United States, to what extent can a collective bargaining agreement between a labor union strike down that right?

Where the union is not a party to the proceedings, and where the union refuses to submit a claim to arbitration, is not an employee deprived of a forum where he may present his claim for wages for personal services?

The Courts of Pennsylvania recognize that there must be an agreement to arbitrate before arbitration can be requested, and where there is a denial of the existence of such a contract, the courts must be open.

This question was considered in the case of *Goldstein, et al. v. International Ladies' Garment Workers' Union, et al.*, 328 Pa. 385.

A contract calling for arbitration between the petitioner and the respondent for personal services would be illegal under the Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 P. S. 161, because it specifically excludes from its operation all contracts for personal services.

Indeed, the Superior Court of Pennsylvania in this case conceded that the Arbitration Act is inapplicable, but circumvents the Pennsylvania Law by making the Act applicable if a collective bargaining agreement exists. It argued that since the labor union of which the petitioner is a member made a contract with the respondent employer on behalf of the members of the union and the company, and because that contract contained provision for a voluntary arbitration of disputes between the union and the employer, that as a result of such an agreement a contract for personal services would not be excluded from arbitration.

The Court below reached this astounding conclusion by arguing that the Pennsylvania Arbitration Act did not abrogate common law arbitration, but common law arbitration requires an agreement to arbitrate, which does not exist in this case, and it requires not only an agreement but a particular person must be designated as the arbitrator, as the Superior Court in its Opinion admits. No such agreement existed between the petitioner and the respondent. The agreement calling for arbitration between the Union and the respondent is one specifically coming

under the Pennsylvania Arbitration Act, and would relate to all matters in dispute, except those matters excluded by law, such as contracts for personal services. Nowhere in the common law can a contract for personal services be enforced by specific performance.

Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210.

Since no contract to arbitrate existed between the petitioner and the respondent invoking arbitration, the attempt to compel the petition to submit to arbitration under the common law is a further violation of due process, and accentuates the violation of the petitioner's Constitutional rights.

The appellate courts of Pennsylvania admit that under the common law an agreement to arbitrate may be revoked. Even if it would be assumed that the Labor Union represents the petitioner in all matters of employment, then certainly the refusal of the Union to arbitrate and the institution of suit by the petitioner would be a revocation of any agreement for common law arbitration.

In any event, it is clear that the appellate courts of Pennsylvania, in compelling the petitioner to seek arbitration, is depriving him of his Constitutional rights. He may be completely out of court if the Union refuses to arbitrate, or if compelled to go to arbitration evinces no interest in the proceedings.

It is submitted that the petitioner has been guaranteed certain basic rights by the Fourteenth Amendment of the Constitution of the United States. These rights have been denied him by the action of the appellate courts of Pennsylvania.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 21, 1954.

APPENDIX A.

The Pennsylvania Arbitration Act.

The Act of 1927, April 25, P. L. 381, No. 248, Paragraph 1, 5 P. S., Paragraph 161, reads as follows:

> "A provision in any contract, EXCEPT A CONTRACT FOR PERSONAL SERVICES, to settle by arbitration a controversy thereafter arising out of such contract, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." (Emphasis supplied.)

A Petition to Stay under the Pennsylvania Arbitration Act is based upon the same Act as amended 1935, June 21, P. L. 400, Paragraph 1 of which reads as follows:

> "If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding, is referable to arbitration under such agreement, shall, upon application of one of the parties made before the suit or proceeding is at issue, stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

The Pennsylvania Arbitration Act, as amended 1935, June 21, P. L. 400, Section 2, provides as follows:

> "(b) An appeal may be taken to the Supreme or Superior Court, as in cases of final judgments, from

an order either staying or refusing to stay the trial of a suit or proceeding pending arbitration, or from an order either directing or refusing to direct the parties to proceed to arbitration. Such appeal must be taken and perfected within thirty days from the date when the order is made, shall be made returnable on the third Monday after it is taken, and shall be placed by the appellate court at the head of its argument list for civil cases, to be heard at the earliest date, consistent with its rules governing the presentation of appeals."

APPENDIX B.

The Opinion Sur Defendant's Petition to Stay Proceedings Pending Arbitration, by the Court of Common Pleas No. 1 of Philadelphia County, reads as follows:

The plaintiff in this case was an employee of the defendant company. The rate of pay he received was determined by a schedule of pay for different job classifications agreed upon by the employer and the Federal Labor Union, the collective bargaining representative of the defendant's employees. The employer classified the plaintiff as a coremaker and paid him the wages for that classification. The plaintiff alleges he performed the work of a leading molder and should have been classified as such. The rate of pay for a leading molder is higher than the rate for a coremaker. The plaintiff filed a complaint in assumpsit to receive the difference in wages between those he received and those he allegedly should have received. The action is for the years 1946 to 1951.

The defendant interposed preliminary objections to the complaint and amended complaint which were overruled by the Court and from which no appeal was taken. The defendant then petitioned the court for a stay in proceedings pending arbitration. The disposition of this petition is the question here involved.

The petition must be dismissed.

In order to sustain its petition, the defendant must prove a contract between the plaintiff-employee and defendant-employer wherein the employee agreed to arbitrate conflicts of this nature. The defendant produced a series of contracts for the years in question made between the defendant company and the Federal Labor Union. The articles dealing with grievances and arbitration in the separate contracts are substantially the same and for our purposes can be considered similar. Attached to the petition of the defendant were four booklets containing the hourly workers collective bargaining agreement. In the

contracts of 1947 and 1948 the grievance and arbitration procedure is found in Articles V and VI. In the contracts of December 1950 and January 1950 these articles are XV and XVI. The language of the Article on Grievances is:

> "The procedures under this Article are available to the *Union* or the *Company* for the presentation and settlement of grievances arising under the terms of this agreement."
>
> "Should any difference arise between the *Company* and the *Union* as to the meaning and application of or compliance with the provisions of this agreement, . . . there will be no work stoppage but an earnest effort shall be made to settle the matter promptly in accordance with the procedure set forth below."

The language of the Arbitration Article also limits the parties covered to the Union and the employer.

> "(In the event the grievance is not settled) such grievance may be appealed to arbitration by *either party*.

"Either party" are those mentioned in the preceding grievance article, the Union or the Company. The term "Union" is distinct from the term "employees" and are not used interchangeably.

The collective bargaining agreement is not the contract of employment upon which the plaintiff-employee can sue or be sued. The collective bargaining agreement establishes the terms of the contract of the individual employee which he enters into when he accepts his job. *Case v. N. L. R. B.* 321 U. S. 332. It is upon this individual contract that this action is based.

The contract of the individual is controlled by the collective agreement. But not all the terms of the collective contract are part of each individual contract. Terms of a collective contract may relate to the relationship between the Union and the Company and have nothing to do with the individual hiring contract. An example of this is

Article III of the Collective Contract of December 4, 1950 dealing with the transaction of union business.

The Arbitration Article of the collective agreement does not relate to each individual contract but only to the relationship between the union and company. The terms of the contract make this clear.

An additional reason for dismissing the petition to stay the proceedings, is that the Arbitration Act of 1927 (5 Purdons sec. 161 et seq) under which the petition is sought, is not applicable. That act excludes contracts for personal service, sec. 161. A contract for personal service is one wherein part of the bargained for exchange is the personal services of one of the individuals. This is by definition. See also *Kaplan, etal v. Bagrier, etal*, 12 D. & C. 693 (1929). The contract by which the plaintiff was hired is a contract for personal service. It is on the basis of this individual contract the court should determine the issue. Although the contract between the union and the employer is not a contract for personal service, no employee has employment as a result of this contract. This collective contract merely controls what will be in the individual contracts. *Case v. N. L. R. B., supra.*

The petitioner next urges that if the Arbitration Act of 1927 is not applicable, the arbitration clause in the collective contract is enforcible at common law. This, however, is not the common law. An agreement to arbitrate is enforcible at common law only if a *particular* person is chosen as arbitrator.

> "Where an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal *named* (emphasis added), but to one or more persons to be eventually chosen by the parties, it is revocable by either party." *Yost v. Insurance Co.* 179 Pa. 381, 384, (1897).

In the article of the collective agreement dealing with arbitration, no particular person or tribunal is named. A

pool of four arbitrators is agreed upon and from these, one is chosen to arbitrate. If the four are unacceptable to either party, one of the four is chosen by lot.

Therefore, the court enters the following:

ORDER.

AND Now, this 26th day of January, 1954 defendant's rule on plaintiff to show cause why proceedings should not stay pending arbitration is discharged.

By THE COURT,

/s/ GRIFFITHS, *J.*

APPENDIX B.

The Opinion of the Superior Court of Pennsylvania on the Appeal from the Order of the Court of Common Pleas No. 1 of Philadelphia County discharging Rule to Show Cause Why Proceedings Should Not Be Stayed Pending Arbitration, September Term, 1951, No. 2218, reads as follows:

FILED: May 27, 1954

OPINION By HIRT, *J*

Plaintiff had been in the employ of the defendant company, a manufacturer of steel products, for many years. He was classified as a Molder-Coremaker and was paid at the rates applicable to that classification, as fixed from time to time by a series of collective bargaining agreements entered into by the defendant with Federal Labor Union Number 18887. Some time prior to February 22, 1951, plaintiff was advised that throughout the period of his employment he had been doing the work of a Leading Molder-Coremaker [1] and was entitled to wages at the higher rates established by the collective bargaining agreement for workmen in that classification. Accordingly he then demanded that the defendant pay him the difference between the total wages actually received by him and the total wages computed at the higher rates of a Leading Molder for the period, not barred by the Statute of Limitations, of six years immediately preceding the above date of demand. The defendant disclaimed liability whereupon plaintiff ultimately brought an action in assumpsit to recover the additional sums which he alleged were due him for that period. When its preliminary objections to the plaintiff's complaint were dismissed, the defendant petitioned the lower court to stay the assumpsit action pending arbitration

1. A Leading Molder according to the testimony was one charged with the responsibility of assigning and supervising the work to be performed by the molders under him and of keeping records of the quantity and pattern numbers of the castings produced.

of the disputed claim in accordance with the terms of the written collective bargaining agreements entered into with defendant by the above union on behalf of plaintiff and other employes of defendant.

The defendant's plant was a union shop and the above Federal Labor Union, a local affiliate of the American Federation of Labor, was "the sole bargaining agent for all hourly production and maintenance employees of the company . . ." Throughout the period of plaintiff's employment a series of collective bargaining agreements fixed the hourly rates of pay applicable to the various classes of production and maintenance employes. The agreements by their avowed terms were designed "to promote and maintain harmonious industrial and economic relationships between the Company and its employees . . ." and they comprehensively defined the reciprocal rights and duties of the employer and the employes for whom the union acted in all phases of their relationships.

Claimant, throughout the period, was a member of the above union. Here, just as in unemployment compensation cases, union members are bound by the action of the union as their agent in negotiating collective bargaining agreements with their employer. Curcio Unemployment Compensation Case, 165 Pa. Superior Ct. 385, 391, 68 A. 2d 393; Byerly Unemploy. Compensation Case, 171 Pa. Superior Ct. 303, 311, 90 A. 2d 322. As an incident of membership in a union an employe designates his union as his representative to act for him as his agent in collective bargaining with the employer and in all matters pertaining to his employment. Prentice Unemployment Comp. Case, 161 Pa. Superior Ct. 630, 637, 56 A. 2d 295; Burns Unempl. Compensation Case, 164 Pa. Superior Ct. 470, 65 A. 2d 445; Lavely Unemployment Comp. Case, 166 Pa. Superior Ct. 481, 485, 72 A. 2d 300.

Plaintiff's disputed claim for additional compensation as wages raised a question "relating to individual rates of pay" and, contrary to plaintiff's contention, constituted

a "grievance" within the definition of Article XV of the collective bargaining agreement. That Article prescribes the procedure to be followed, in designated steps, looking toward the adjustment of all grievances arising under the terms of the agreement. And Article XVI provides: "In the event that the procedure as set forth in Article XV shall have been followed in respect to any grievance and such grievance shall not thereby have been satisfactorily settled, and if such grievance relates either to the interpretation, application of or compliance with the provisions of this agreement, then such grievance may be appealed to arbitration by either party as hereinafter provided." Other sections of the same article set up the procedure for an "appeal to arbitration" and established a formula for the selection of an Impartial Arbitrator to hear and decide the disputes referred to him. Section 10 provides: "The decision of the Impartial Arbitrator on any matter within his jurisdiction and authority shall be final and binding upon the Company, the Union and the Employees."

It is plaintiff's position that even if his contested claim for additional wages constitutes a "grievance" within the purview of the bargaining agreement, it is not a proper subject for arbitration because the Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 PS § 161 specifically excludes from its operation all contracts for personal services. It must be conceded that the Arbitration Act is inapplicable but the parties to the present contract, between the Union, on behalf of its members and the company, in agreeing upon the voluntary arbitration of disputes, are not restricted to the procedure or limitations of that Act. Public policy in Pennsylvania has long favored arbitration of disputes even to the extent of outlawing statutes which attempted to abolish it. Adinolfi v. Hazlett, 242 Pa. 25, 28, 88 A. 869. Plaintiff's claim for additional wages is based on rates of pay fixed by the collective bargaining agreement. He cannot be allowed benefits under the favorable provisions of the agreement and refuse to be bound by the

terms which are to his disadvantage. Prentice Unemployment Comp. Case, supra; Jablonsky Unempl. Compensation Case, 168 Pa. Superior Ct. 511, 79 A. 2d 272. Claimant is bound by the limitations imposed by the provisions of the contract. Miller v. Johnstown Traction Co., 167 Pa. Superior Ct. 421, 427, 74 A. 2d 508.

To nullify the agreement in this case would amount to the denial of the Constitutional right of contracting for the arbitration of grievances relating to a lawful subject which does not involve any question of public policy. Clearly the answer to plaintiff's contention is that the 1927 Act did not abrogate common law arbitration; the remedy provided by that Act is cumulative merely and not exclusive. Rosenbaum et al. v. Drucker et al., 346 Pa. 434, 31 A. 2d 117; Sukonik v. Shapiro, 333 Pa. 289, 5 A. 2d 108; Isaac et al. v. D. & C. Mut. F. Ins. Co., 301 Pa. 351, 152 A. 95; Reading Tube Corp. v. Steel Wrkrs. Fed., 173 Pa. Superior Ct. 274, 98 A. 2d 472; Jt. Bd. Waist & Drmkrs' Union v. Rosinsky, 173 Pa. Superior Ct. 303, 98 A. 2d 447.

As to common law arbitration it was recognized in the court below that if parties to an executory contract agree that any dispute arising under the contract shall be determined by an individual *named* in the agreement, whose decision shall be final, no action at law will lie for a breach of the agreement. Monongahela Navigation Company v. Fenlon, 4 W. & S. 205. But the court held that arbitration was not enforcible at common law in this instance because no *particular* person was chosen as arbitrator. In so holding the principle of Yost v. Insurance Co., 179 Pa. 381, 36 A. 317 to this effect was considered controlling: ". . . where an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by the parties, it is revocable by either party." The provisions of the present contract do not bring it within the Yost case. Section 5 of Article XVI of the collective bargaining agreement, prescribing the successive steps in the

arbitration procedure, provides: "The Company and the Union have agreed upon four (4) impartial arbitrators. The names of such arbitrators will be set forth in a letter from the Company to the Union." It thus appears that four arbitrators have been *named,* one of whom by section 6, is required to be chosen by the parties as the Impartial Arbitrator whose decision shall be final. Section 7 contemplates the possibility of the inability of the parties amicably to comply with section 6 by providing: "In the event that the parties are unable to agree upon the selection of an arbitrator from such list, an arbitrator shall be selected therefrom by lot who shall thereupon be appointed the impartial arbitrator of the dispute in question." Thus, unlike in the Yost case where the selection of an arbitrator was left entirely to the future, the Impartial Arbitrator who is to decide the present dispute, is one of four who have been *named* by the parties and the agreement sets up the *formula* for his selection from the group of four so named. One of a number of named persons selected by the operation of a formula embodied in the contract, has the same status as an Impartial Arbitrator agreed upon in advance and named by the parties as such in their contract. Cf. Sukonik v. Shapiro, 333 Pa. 289, 5 A. 2d 108. In the circumstances the maxim *Id certum est quod certum reddi potest* should have application. Where the parties by contract contemplate the settlement of disputes by arbitration every reasonable intendment will be made in favor of their agreement. Curran v. Philadelphia, 264 Pa. 111, 115, 107 A. 636.

Section 12 of Article XVI of the collective bargaining agreement as related to arbitration in this case provides that " . . . no award . . .shall in any case be retroactive prior to the date on which the grievance was submitted . . ." i.e., in accordance with the procedure of Article XV. In an action in assumpsit the only bar is the Statute of Limitations. Manifestly an action is assumpsit in derogation of the contract would be to the plaintiff's

advantage. In our view he is bound by his contract both in the method of prosecuting his claim and as to the period over which he in any event may be entitled to additional compensation.

Order reversed and proceedings stayed pending common law arbitration of plaintiff's grievance as to the rate of pay to which he was entitled.

APPENDIX C.

The Order of the Supreme Court of Pennsylvania reads as follows:

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

CHARLES H. McKIBBEN
Prothonotary
MAY C. REESE
Deputy Prothonotary

Philadelphia 7,
June 29, 1954.

Edward Davis, Esq.,
215 So. Broad Street,
Philadelphia 7, Pennsylvania.

Re: Povey v. The Midvale Co., Appellant,
No. 120-A. Miscl. Docket No. 10.

Dear Sir:

The Court made the following order on your petition for allowance of appeal from the Superior Court to the Supreme Court in the above entitled matter:

"PETITION DENIED.

PER CURIAM.

June 28, 1954."

Yours very truly,

/s/ MAY C. REESE,
Deputy Prothonotary.

mcr/h
c/c to

Miles W. Kirkpatrick, Esq.,
Morgan, Lewis & Bockius, Esqrs.,
2107 Fidelity-Phila. Tr. Bldg.,
Philadelphia 9, Penna.

37/33

Office - Supreme Court, U.
FILED
OCT 21 1954
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954 No. 365

JOHN POVEY,
Petitioner,

v.

THE MIDVALE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

INDEX

PAGE

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 4

CONCLUSION 8

Citations

CASES:

Association of Westinghouse Salaried Employees *v.* Westinghouse Electric Corporation, 210 F. 2d 623 6

Elgin, Joliet & Eastern Railway Co. *v.* Burley, 325 U. S. 711 8

Philadelphia Ball Club, Ltd. *v.* Lajoie, 202 Pa. 210 7

STATUTES:

28 USC Section 1257(3) 2

Constitution of the United States, Article XIV, Section 1 2

Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 P. S. Section 161 ..... 2, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 365.

John Povey,
Petitioner,

v.

The Midvale Company,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the Court of Common Pleas of Philadelphia County (Appendix "B", p. 3a of Petition) is unreported. The Opinion of the Superior Court of Pennsylvania (Appendix "B", p. 7a of Petition) is reported at 175 Pa. Super. 395. The Order of the Supreme Court (Appendix "C", p. 13a of Petition), denying *per curiam* the petition for allowance of appeal from the Superior Court, is unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTION PRESENTED.

Did the Superior Court of Pennsylvania properly interpret the collective bargaining agreements entered into with Petitioner's employer by a union of which Petitioner was a member, and which was Petitioner's representative, as providing that the grievance procedure and arbitration provisions were the exclusive means for the settlement of his grievance?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provisions of the Constitution of the United States (Article XIV, Section 1) and of the Pennsylvania statute (Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, 5 P. S. § 161) which Petitioner states to be involved are respectively set forth in the Petition at page 3 and in Appendix "A", p. 1a.

STATEMENT OF THE CASE.

Petitioner is an employee of Respondent whose claim against Respondent is for additional wages for his employment during the period 1946 to 1951. The Petitioner alleges that he performed the duties of a "Leading Molder" in Respondent's mill but was classified as a "Coremaker" and as such received fifteen cents (15¢) per hour less than he would have received as a Leading Molder. Petitioner's action is in assumpsit to recover

the difference between the amount that was paid to him as a Coremaker and the amount that he contends he should have been paid as a Leading Molder.

The rates of pay of the Leading Molder and of the Coremaker were contained in the series of collective bargaining agreements between Respondent and Petitioner's collective bargaining agent, Federal Labor Union No. 18887, A.F.L., covering the period for which Petitioner claims additional wages. Petitioner was a member of that Union and within the bargaining unit represented by it during the entire period covered by his claim for additional wages.

The collective bargaining agreements also contain provisions providing for arbitration as the exclusive means of the settlement of grievances arising under the agreements, including any question "relating to individual rates of pay". The agreements set forth a detailed procedure for appeal of grievances through various echelons of management to arbitration. Four impartial arbitrators are named as a panel, and the selection of one of them is to be made either by agreement of the parties or, failing agreement, the arbitrator will be chosen by lot from among the four. Finally, the agreements provide that the decision of the arbitrator "shall be final and binding upon the Company, the Union and the Employees".

This case was decided in the Pennsylvania Courts upon a petition of the Respondent that the proceedings be stayed pending arbitration. The Respondent's Petition to Stay and the oral depositions in support thereof demonstrate that the Respondent was at all times willing to arbitrate the Petitioner's claim under the provisions of the collective bargaining agreements. Further, during the considerable number of meetings between representatives of the Respondent and representatives of Federal Labor Union No. 18887, A.F.L., acting on behalf of the Petitioner, Respondent denied that Petitioner had performed duties calling for a higher rate of pay.

It was also shown that Petitioner's Union, although espousing Petitioner's cause in many meetings with the Respondent, refused to commit the Petitioner's grievance to the grievance procedure under the collective bargaining agreements or to take it to arbitration. The reason for the Union's refusal to take Petitioner's grievance to arbitration was made evident. Included in the grievance and arbitration provisions of the collective bargaining agreements is a clause that would limit the Petitioner's right to recover any back wages to the period following the time after a grievance was first filed in writing; no written grievance has ever been filed. As noted in the Opinion of the Superior Court (Petition, p. 11a), were the Petitioner permitted to pursue his action in the courts the only bar might be the Statute of Limitations of Pennsylvania.

ARGUMENT.

It is significant that the Petitioner does not attempt to put in issue any Federal law governing the relationship between employers and employees and their unions. There is not here involved, for example, any question concerning the authority of a collective bargaining representative under the National Labor Relations Act, as amended. The Petitioner is unable to raise any such questions because the record in this case is devoid of any showing of interstate commerce which would give rise to any Federal interest in the relationships involved.

The decision of the Superior Court of Pennsylvania turns entirely upon settled decisional law of the Commonwealth of Pennsylvania. The Petitioner argued that his claim was not a "grievance" such as was required to be handled through the grievance procedure and arbitrated under the provisions of the collective bargaining agreements. The Court, however, interpreted the agreements to require arbitration and, although holding the Pennsyl-

vania Arbitration Act of 1927 to be inapplicable, held that that Act had not abrogated common law arbitration. In that connection the Superior Court adverted to the decision of the Lower Court holding that the arbitration provisions in the collective agreements were not enforceable at common law because no particular person was named as arbitrator in advance of the dispute. The Court pointed out that the collective agreements named a panel of four arbitrators, and that it was further provided that one arbitrator was to be chosen to arbitrate each grievance either by agreement between the employer and the Union or, failing agreement, the arbitrator would be chosen by lot.

The question decided by the Superior Court was that one of the named persons selected by the operation of the formula embodied in the agreements had the same status under the common law of Pennsylvania as a single arbitrator named in advance by the parties.

Petitioner's attempt to find a constitutional issue in this case is a vain one. At one point in his Petition (Petition, p. 8) he states that "where the existence of a contract between himself and the respondent, providing for arbitration is denied" he has a constitutional right to have the issue determined by a judicial tribunal. Petitioner's assertion in this respect is the more remarkable because what he says should have been done is exactly what was done in this case.

Before the Trial Court the Respondent attached to its Petition to Stay Pending Arbitration copies of the collective bargaining agreements which included the arbitration provisions. Petitioner, in answering the Petition to Stay, admitted the existence of the collective agreements covering his employment. Those agreements, their arbitration provisions, and their wage schedules were never denied or controverted by the Respondent. There was and is no factual dispute concerning the existence and validity of the collective agreements. The Trial Court and the Superior Court of Pennsylvania interpreted those

agreements and determined the issue of arbitration against the Petitioner.

Certainly, Petitioner has not been deprived in these proceedings of the opportunity to have the issue of arbitration determined by judicial tribunal.

Petitioner calls attention to the case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation,* 210 F. 2d 623, pointing out that certiorari has been granted by the Supreme Court of the United States in that case. The suggestion is implicit in Petitioner's reference to that case that the issues there involved are pertinent to the issues raised by Petitioner in the instant case. However, that case is to be completely distinguished from the instant case in that there are there involved important questions under the Labor Management Relations Act of 1947.

Appreciating, perhaps, his inability to raise a question under the Federal laws governing the relationship between employers and unions and realizing that the constitutional questions which he has raised are unimpressive, Petitioner also seeks to have the Supreme Court of the United States review the decision of the Superior Court of Pennsylvania interpreting the Pennsylvania Arbitration Act of 1927 and the common law of Pennsylvania relating to arbitration. The Superior Court of Pennsylvania interpreted the Pennsylvania Arbitration Act of 1927 to provide a remedy cumulative to that provided by common law arbitration. That has been the holding of the Supreme Court of Pennsylvania in many cases (see cases cited in the Opinion of the Superior Court at page 10a, Appendix "B", of the Petition). Again, the question raised is purely one of Pennsylvania law involving the interpretation of its Arbitration Act against the background of its common law decisions on arbitration.

Lastly, Petitioner argues that the Appellate Courts of Pennsylvania have in some way violated the constitutional rights of the Petitioner by enforcing the arbitration provisions in a contract for personal services. In this

connection, Petitioner either is saying that a collective bargaining agreement is a contract for personal services, or he is saying that the original individual contract made at the time of his first employment with the employer in 1930 is the one that is being enforced. Actually, it makes no difference to which contract he is referring, because he entirely misconceives the applicable law. It is true, of course, that the Courts of Pennsylvania and elsewhere will not enforce a personal service contract to the extent of requiring an employer to hire a particular employee or requiring an employee to work for a particular employer. That is not to say, however, that effect will not be given to other aspects of the employment contract. It is Hornbook law that a negative covenant in an employment agreement may be enforced. In fact, in the case cited by Petitioner in support of his argument on this question, *Philadelphia Ball Club, Ltd.* v. *Lajoie,* 202 Pa. 210, the Supreme Court of Pennsylvania was at pains to recognize the distinction between requiring services to be performed and granting specific performance of a negative covenant in an employment agreement.

In the instant case the decision of the Superior Court of Pennsylvania involves no requirement of the continuation of the employment relationship. There is here involved only the recognition by the Pennsylvania Courts of a covenant not to sue arising out of an agreement that all disputes shall be settled through arbitration.

It is submitted also that the result reached by the Court below was clearly correct. The instant case involves an employee who, with the cooperation of his Union, is attempting to circumvent arbitration as the agreed upon procedure for the settlement of employee grievances. His reason, and the Union's reason for cooperating, is obvious. The collective agreements establish an informal "statute of limitations" by providing that arbitration awards may not be retroactive to a date earlier than the filing of a grievance in writing. The provision in question is noted in the Opinion of the Superior Court (Petition, p. 11a)

where the Court observes that in an action of assumpsit the only bar would be the Statute of Limitations. It may be assumed that the Union agreed to such a provision in return for something of benefit to it and the employees elsewhere in the agreement. In fact, it may well be that the very wage scale upon which Petitioner now attempts to sue was fixed in part in consideration of the protection to the employer from stale wage claims expected to be afforded by the limitation on retroactivity of awards. Under these circumstances it would be unconscionable to permit Petitioner to circumvent the agreements by maintaining his suit in the Courts.

It may be noted that the case does not involve any question such as was involved in *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U. S. 711, where a union attempted to settle with an employer employees' claims that had already accrued. In the instant case the arbitration provisions were prospective in operation. Similar arbitration provisions are commonplace in this country's industrial life. The purpose of arbitration provisions is to provide for the prompt and orderly settlement of disputes, and if the Petitioner here is permitted to circumvent those provisions, the stability and integrity of collective bargaining relationships throughout the country would be impaired.

CONCLUSION.

The decision below is clearly correct and involved no Federal question of substance. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERICK H. KNIGHT,
MILES W. KIRKPATRICK,
Attorneys for Respondent.

OCTOBER 19, 1954.